1957

Lloyd D. Sutton et al v. Nick Marvidikis et al : Brief of Plaintiffs and Respondents

Utah Supreme Court

S. J. Sweetring; Attorney for Respondents;

Case No. 8587

IN THE SUPREME COURT
of the
STATE OF UTAH

LLOYD D. SUTTON, HARVEY L. RANDALL, GALE V. BARNEY and PAUL ANNELLA, a co-partnership, doing business under the name and style of BLUE FLAME COAL COMPANY,

Plaintiffs and Respondents

—vs.—

NICK MARVIDIKIS, FAYE OLSEN, CLARON GOLDING, MALIO PECORELLI, FRANK SACCO, and all others engaged in the picketing of the coal mine of the Blue Flame Coal Co.; and UNITED MINE WORKERS OF AMERICA,

Defendants and Appellants

CASE
No. 8587

BRIEF OF PLAINTIFFS AND RESPONDENTS

S. J. SWEETRING
Attorney for Respondents
Silvagni Building
Price, Utah

TABLE OF CONTENTS

AUTHORITIES CITED

CONSTITUTION OF UTAH

STATUTES

IN THE SUPREME COURT
of the
STATE OF UTAH

LLOYD D. SUTTON, HARVEY L. RANDALL, GALE V. BARNEY and PAUL ANNELLA, a co-partnership, doing business under the name and style of BLUE FLAME COAL COMPANY,

Plaintiffs and Respondents

—vs.—

NICK MARVIDIKIS, FAYE OLSEN, CLARON GOLDING, MALIO PECORELLI, FRANK SACCO, and all others engaged in the picketing of the coal mine of the Blue Flame Coal Co.; and UNITED MINE WORKERS OF AMERICA,

Defendants and Appellants

CASE
No. 8587

BRIEF OF PLAINTIFFS AND RESPONDENTS

S. J. SWEETRING
Attorney for Respondents
Silvagni Building
Price, Utah

The parties will be referred to as they appear below, the respondents herein being the plaintiffs and the appellants, the defendants.

The figures in parentheses refer to the page number of the Record.

STATEMENT

Plaintiffs believe that the issues are fairly raised by defendants' "Statement of Points on Appeal" (Brief, page 8) and we shall meet those points in the order presented in defendants' argument.

We do not subscribe to defendants' "Statement of the Case" (Brief, pages 1-8) nor to their analysis of relevant statutes and decisions.

In so far as the facts are concerned defendants write as though the trial judge had not disbelieved them on crucial disputed testimony and had not found in plaintiffs' favor on plaintiffs' undisputed testimony. In so far as the law is concerned defendants write as though during the past decade no statutes had been enacted (Utah Right to Work Law of 1955), regulations promulgated (N. L. R. B. "jurisdictional yardstick" regulations of 1954, infra), or decisions enunciated (inter alia, the Hanke case of 1950, and other "post-Taft-Hartley" decisions, infra).

In the course of our documenting the record which sustains the decision of the court on the particular matters raised by defendants in their "Statement of the Facts" we shall also answer the one or two law points urged by defendants in their "Statement of Facts."

Defendants are highly critical of the trial court's having believed and accepted the testimony of plaintiffs' witnesses, but fail to recognize the nature and import of the evidence that prompted the trial court to find find the truth on the side of the plaintiffs. For example the attitude of Walter Odendahl, a man of many years experience in

all departments of coal mine operation (137), was not one of antagonism to unions in general, or the United Mine Workers of America in particular, but his financial inability to meet the terms of a United Mine Workers contract (125, 142, 146, 147, 149, 153, 158, 164, 187, 188, 337). That was the reason Odendahl shut down the mine, and it is the prerogative and constitutional right of any business man, with or without reason, to continue or discontinue in business as he sees fit; and no one is privileged to complain even though he does it deliberately to avoid a labor dispute. **(Tarr v. Amalgamated Ass'n. of Street Electric Ry. & Motor Coach Employees of America, Division 1055 et al** (Idaho 1952), 250 P. 2d 904). The trial court recognized this right of one to dispose of his property and go out of business (139).

Defendants assert that there is evidence that Walter Odendahl coerced three employees into terminating their employment, and cites the testimony of the defendant Pecorelli as to what he was supposedly told by Rebail Motte and the defendants Claron Golding and Faye Gene Olsen. The defendants Claron Golding and Faye Gene Olsen, who appeared in this cause as witnesses, did not corroborate the testimony of Pecorelli. Mr. Rebail Motte was never called as a witness. Those three employess of Odendahl voluntarily severed their employment with the Star Point Coal Co. (Exhibit E), under the circumstances as stated by Odendahl (144).

Defendants refer to what they designate as a "so-called partnership" among the plaintiffs (Exhibit D), and state that the question arises as to whether the lease from

Odendahl to the partnership was bona fide or sham. There is no evidence in the record to controvert the existence of the partnership, or establish that the lease was not bona fide. Counsel for the defendants admitted, under the questioning of the trial court, that defendants had nothing to show that the lease was merely a front (140), and the trial court found the partnership and lease to be bona fide, and "that in this good old U.S.A." the parties had a right to enter into such relationship and plan of operation (299).

That the plaintiff partnership, under an arrangement as found by the trial court that obviated the necessity of their having employees (299), could not accept the usual contract of the United Mine Workers of America embodying terms of seniority of employment, and requiring the re-employment of all former employees of Walter Odendahl, is self-evident (129; 134; 135).

At this point it is appropriate to call attention to the fact that defendants apparently have lost sight of their antagonist. It is the plaintiffs with whom defendants have their quarrel. The plaintiffs have no employees — they need none and want none. Odendahls who formerly operated the mine **with employees** are no longer involved. For defendants to narrate the circumstances and argue the law as though the case were against Odendahls is to miss the point entirely.

Defendants indicate that the ex-parte restraining order granted by the trial court was unlawful because of non compliance with Sec. 34-1-28 U.C.A. 1953. The

Utah Right to Work Law, 34-16-1 to 18, while not expressly negativing the application of the Labor Disputes Act, Title 34, Chap. 1, U.C.A. 1953, is the latest expression of the legislature, and is controlling as to injunctive relief under that Law; and if there is any conflict between the two acts, the Right to Work Law supercedes the conflicting portion of the Labor Disputes Act. **Hanson v. Internatoinal Union of Operating Engineers Local No. 406,** 79 So. 2d 199, (1955); 82 C.J.S., 489, Sec. 291; **Bullen v. Anderson,** 81 Utah 151, 27 P. 2d 213.

Defendants contend that the plaintiffs, by taking over the mine, assumed the alleged labor dispute between Odendahl and the United Mine Workers of America As has heretofore been stated, it was Odendahl's prerogative and constitutional right to discontinue his business; the trial court recognized that right (139); counsel for the defendants admitted that defendants had nothing to show that the lease was merely a front (140); and the trial court found the partnership and lease to be bona fide (299). Under such circumstances, a successor cannot be made to bear the burden of his predecessor's unfair labor practices, if any existed. **(Tarr v. Amalgamated Ass'n. of Street Electric Ry. & Motor Coach Employees of America, Division 1055 et al, supra).** The cases cited by defendants in support of their position to the contrary (Brief, page 4), **National Labor Relations Board vs. New Madrid Manufacturing Co.,** 215 F (2d) 908; **Regal Knitwear Co. vs. N.L.R.B.** 324 U. S. 9, 65 S. Ct. 478; **N.L.R.B. vs. Atkins,** 67 S Ct. 1265, 331 U. S. 398) simply do not sustain any such proposition, as a reading of those parti-

cular cases will demonstrate clearly.

Defendants next contend that there is a labor dispute existing in this case pursuant to Sec. 34-1-34, U.C.A. 1953, while the definitions controlling the interpretation of the Labor Disputes Act provide:

> 34-1-2 Definitions — When used in this act:
> (9) The term "labor dispute" means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives.

No "labor dispute" can exist under that definition, because the plaintiffs have no employees (206).

The evidence is in conflict as to the purpose of the picketing, and who was being picketed (204). The trial court found upon substantial evidence that the picketing was coercive (284, 252), enmeshed with violence, accompanied by threats (227, 228, 229, 254-55), and for an unlawful purpose. The picketing was coercive in that it was conducted on a highway travelled by scarcely anyone other than the plaintiffs and the independent truckers hauling coal from the mine to the railroad. The evidence shows that the picketing could not, and did not, acquaint the public and the people who travelled along said highway that there was an alleged labor dispute. (325-27) Picketing under such existing cercumstances is not the exercise of free speech, it is coercion. **Vogt, Inc., a Wisconsin corporation, Respondent, vs. International Brother-**

hood of Teamsters, Local 695, et al. (Wisc. 1956), 74 N. W. 2d 749.

The picketing was enmeshed in violence—the blowing up of a bridge and the spreading of roofing nails on the only road to plaintiffs' mine. While there is no direct proof as to who was responsible for that destructive conduct, it is observed that the evidence shows that on the morning following the damage to the bridge and the spreading of the nails, the trucker Mr. Steineger was not stopped or hailed as he approached the picket line — the pickets just waved at him as he went through "over the nails" (219) ,and when he got as far as the bridge he found it was "blowed up"; whereas on the other occasion he was stopped at the line by the pickets. Within one week after Mr. Steineger testified, and after the trial court granted a temporary injunction, the defendant Faye Olsen shot into the radiator of Mr. Steineger's truck and into the truck of the plaintiff Randall.

The picketing was accompanied by threatening language as found by the trial court, and was for the unlawful purpose of denying and abridging the right of the plaintiffs to work on account of their non-membership in a labor union.

Defendants complain because the trial court found Pecorelli and Sacco were implicated in the picketing. Yet the defendant Pecorelli, an executive board member of the United Mine Workers of America, whose assignment is the organization of non-union mines (177), told defendant Claron Golding to "put a picket line up there" (238-39); received the reports of the pickets from day to day;

informed the local unions that he visited regarding the picket line; and thereby stimulated the picketing as admitted by his counsel (190). Defendant Frank Sacco, vice-president of District 22 of the United Mine Workers of America, also reported to the local unions that he attended on the progress of the picketing (258) and instructed the pickets (257).

The trial court was privileged to observe the witnesses, their candor, demeanor and fairness. For defendants to argue that there was "ample evidence" or "evidence to the effect" (Brief, page 6) that their testimony might have been accepted by the trial court, is again to miss the point. The court upon a satisfactory record believed the plaintiffs and disbelieved defendants. The record fully justifies the inferences and conclusions reached, and the issuance of a permanent injunction.

ARGUMENT

Point I

THE TRIAL COURT HAD JURISDICTION TO ISSUE AN INJUNCTION IN THIS CASE REGARDLESS OF THE FEDERAL LAW.

A state court has jurisdiction in labor cases involving interstate commerce, notwithstanding the provisions of the Federal Labor Relations Management Act (hereinafter referred to as L.M.R.A.) when either of the following situations prevail:

(1) Whenever the picketing or labor dispute involves or results in violation of local matters of public safety and

order such as violence, threats, blocking of highways or violation of declared public policy; or

(2) Whenever the National Labor Relations Board (hereinafter referred to as N.L.R.B.) under its "yardstick" jurisdiction promulgation of 1954 refuses to take jurisdiction.

The law supporting situation (1) is well established. State jurisdiction has always existed in cases involving threats ,obstructing highways and local matters of public safety and order, such as was found in the instant case enmeshed with coercion, violence, and the violation of the declared public policy of the State of Utah as expressed by its legislature in the Utah Right to Work Law. The law was reaffirmed as recently as June 4, 1956 by the United States Supreme Court in **United Automobile, Aircraft and Agricultural Implement Workers vs. Wisconsin Employment Relations Board** 351 U. S. 266, 76 S. Ct. 794, in the following language:

> There is no reason to re-examine the opinions in which this Court has dealt with problems involving federal-state jurisdiction over industrial controversies. They have been adequately summarized in Weber vs. Anheuser-Busch, Inc. 348 U. S. 468, 474-477, 75 S. Ct. 480, 484-486, 99 L. ed. 546. As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin conduct "which has been made an 'unfair labor practice' under the federal statutes." Id. 348 U. S. at p. 475, 75 S. Ct. at page 485 and cases cited. But our **post-Taft-Hartley opinions**

have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence.

The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction.. We would not interpret an Act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect.

To further emphasize the significance of this decision we quote from the dissent of Mr. Justice Douglas:

We disallowed that duplication of remedy in Garner vs. Teamsters etc. Union 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228. Today we depart from Garner and allow a state board to enjoin action which is subject to an unfair labor proceeding before the federal board.

The law supporting situation (2) is likewise impressive. To merely state the query is to supply the answer: Conceding federal jurisdiction to exist, if the federal government (N.L.R.B.) refuses to exercise jurisdiction in a

labor dispute shall the parties then be left to "the law of the jungle" because of alleged lack of jurisdiction by the state courts?

One of the most recent well-reasoned cases supporting the position taken with respect to point (2) is that of **Lee Mark Metal Manufacturing Company vs. Local No. 596**, 30 Labor Cases 69,968 (Pennsylvania, May 15, 1956) wherein it was held that state jurisdiction was proper in a case affecting interstate commerce where the N.L.R.B refused to exercise its jurisdiction.

In the case now on appeal the mere fact that 40 per cent of the output of the plaintiffs' coal mine, while being operated by Mr. Odendahl, found its way into interstate commerce, does not per se compel Federal jurisdiction or the operation of the L.M.R.A., and exclude state jurisdiction. The L.M.R.A. is the only federal legislation having pertinence to the issues involved in this case, and accordingly Federal jurisdiction in this case must either find its source in that act or it does not apply at all. The burden of the L.M.R.A. is to invest the National Labor Relations Board with the administration and enforcement of the provisions of the act in cases embraced by the act. It is important to note that it is settled law that the N.L.R.B. has the right and is empowered to prescribe the conditions upon which it will entertain jurisdiction of cases. **N.L.R.B. vs. Swinerton and Walberg Company**, 202 Federal 2d 511.

Prior to 1954, the N.L.R.B. apparently accepted and rejected cases on a case-to-case basis, governing itself according to the volume and extent of interstate commerce involved, the applicability or non-applicability of the 'de minimus' doctrine, and kindred considerations. On July 1 and 15, 1954, however, the N.L.R.B., to remedy this variable pattern of operation, promulgated a series of dollar-volume standards as a 'yardstick' for determining if it would or would not invoke its jurisdiction in a given case. See: **Commerce Clearing House Labor Law Reporter** Vol 1, p. 1611, Sec. 1610. Cases which do not conform to the minimum standards of the board's 'yardstick' are not and will not be entertained or processed by the board, notwithstanding that some interstate commerce is involved. Inasmuch as the N.L.R.B. is constituted the sole agency for the administration and enforcement of the act, which, as has been previously noted, is the sole and only establishment of Federal jurisdiction in the premises such as are here concerned, the promulgation by the board of this jurisdictional 'yardstick' has created what has been called a 'penumbral area' between Federal and State jurisdiction. Thus it may be seen that the mere presence of interstate commerce does not of itself give rise to the applicability of the L.M.R.A. with the consequent envelopment of the cause by Federal jurisdiction.

Conformity with the board's jurisdictional 'yardstick' must be shown in addition to the proof of involvement of interstate commerce before the L.M.R.A. or Federal jurisdiction thereunder may be invoked. There was no such showing in this case. The only factor in the record

is that approximately 40 per cent of the output of the coal mine involved herein, under the operation of Odendahl, found its way into interstate commerce, and there is no evidence whatsoever of the necessary 'yardstick' qualifications of an actionable cause before the N.L.R.B. Evidence was offered in the case at bar to show that a charge was filed against Odendahl by some of his former employees with the N.L.R.B. (329-30), and that the N.L.R.B. refused to exercise jurisdiction inasmuch as the operations of the company involved were found predominantly local in character, and it did not appear that it would effectuate the policies of the National Labor Relations Act to exercise jurisdiction. In the Garner and Weber cases (**Garner v. Teamsters Union**, 346 U.S. 485, 74 S. Ct. 161 and **Weber v. Anheuser-Busch, Inc.**, 348, U. S. 468) jurisdiction was expressly predicated on the presence of a cause which was cognizable by the N.L.R.B., and in the instant matter the absence of such a cause, subject to the consideration of burden of proof, renders those cases inapplicable. It is further noted that both the Garner and Weber cases originated prior to the promulgation by the N.L.R.B. of its 'yardstick' policy.

The defendants had the burden of proof of establishing the necessary facts to disprove the jurisdiction of the trial court to act in the premises. Where one seeks to oust a state court from jurisdiction in an injunction proceeding in a labor dispute on the grounds of conflict of jurisdiction, that person assumes and must bear the burden of proving such commerce as will invoke Federal jurisdiction. The defendants in this case failed to prove that

their cause fell within the board's jurisdictional 'yardstick' and therefore their contention of conflict of jurisdiction does not have any validity. In the Garner case itself 346 U. S. at page 488 the court clearly implied that the absence of an actionable cause before the N.L.R.B. leaves a state court free to act in the premises. If the case does not fall within the jurisdictional 'yardstick' of the N.L.R.B., jurisdiction is impliedly ceded to the state court.

When the N.L.R.B. announces that it will refuse jurisdiction in certain types of cases, it states, by implication at least, that the resolution of those matters cannot be effectually had by its processes. "If then the state courts do not take jurisdiction," as stated in the case of **Ringling Brothers-Barnum & Bailey Combined Shows, Inc., vs. Lewis, et al**, New York Supreme Court, 135 N. Y. L. J. April 10, 1956, p. 7 (30 Labor Cases 69,887), "an area of employer-employee relationship reverts to the unsupervised jungle where decisions go to the strong and ruthless." See also a 1955 California Supreme Court case squarely in point: **J. S. Garmon et al vs. San Diego Building Trades Council** 291 P. 2d 1. See generally the case of **Lee Mark Metal Manufacturing Company vs. Local No. 596 International Brotherhood of Teamsters**, supra, and cases cited therein.

It is, therefore, submitted that neither under the preemption doctrine nor under the interstate commerce doctrine, was the trial court in this case without jurisdiction to issue the injunction in this case, and to the contrary state jurisdiction was proper by reason either of (1) the existence of violence, threats, and other violation of local law

existing in this case, or (2) the refusal of the N.L.R.B. to assume jurisdiction because of its jurisdictional 'yardstick' doctrine.

Point II

THE TRIAL COURT HAD JURISDICTION TO ISSUE ITS PERMANENT INJUNCTION HEREIN UNDER UTAH STATUTES.

As we understand defendants, they contend that the trial court also lacked **jurisdiction** to issue its injunction herein because of the provisions and limitations of the Utah Labor Disputes Act, Title 34, Ch. 1, UCA 1953, which is sometimes called the "Little Norris-LaGuardia Act."

Our answer to this contention is two-fold:

(1) The Utah Right to Work Law, Laws of Utah 1955, Ch. 54, Sec. 1, confers the power to issue injunctions in such cases and the Utah Labor Dispute Act, if repugnant to this later expression of our legislature on that point, is repealed by implication.

We believe this Court will not find it necessary to pass upon the constitutional question hereinafter stated because of the well established law governing the first portion of our answer now being set forth. The Utah Right to Work Law specially recognizes the right of the courts to issue injunctions in cases such as this one and while the Utah Right to Work Law does not expressly negative the application of the Utah Labor Disputes Act, it is the latest expression of the legislature, and is control-

ling as to injunctive relief under that law. If there is any conflict between the two acts, the Right to Work Law supercedes the conflicting portion of the so-called "Little Norris-LaGuardia Act." See the case of **Hanson v. International Union of Operating Engineers Local No. 406**, 79 So. 2d 199 (1955) involving the precise question and almost haec verba statutes as our two statutes above referred to:

> "Where two legislative acts are repugnant to, or in confilct with, each other the last one enacted will govern, control, or prevail, and supercede and impliedly repeal the earlier act although it contains no repealing clause."

See also: 82 C.J.S. 489, Sec. 291, citing **Bullen vs. Anderson**, 81 Utah 151, 17 p. 2d 213, wherein it was held that provisions of later statutes prevail over conflicting provisions of an earlier statute.

(2) The Utah Labor Disputes Act in so far as it purports to limit or restrict the power of courts to issue injunctions is clearly an invasion by the legislature of jurisdiction conferred by the Constitution of the State of Utah upon its courts of general jurisdiction and is therefore unconstitutional.

The provisions of the co-called "Little Norris-LaGuardia Act," in so far as they seek to limit the jurisdiction of the district courts of the State of Utah in the granting of relief by injuction, if that is necessary for the protection of rights and property, and to support the declared public policy of the State of Utah as expressed in

its Right to Work Law, are illegal, ineffective and an unconstitutional assumption of power by the legislature, and an infringement upon the inherent right of the courts.

Article V, Sec. 1, Constitution of Utah provides:

"The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of the powers properly belonging to one of these departments, shall exercise any function appertaining to either of the others, except in the cases herein expressly directed or permitted."

Article VIII, Sec. 1, Constitution of Utah provides:

"The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

Article VIII, Sec. 7, Constitution of Utah provides:

"The district courts or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and other writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions."

The framers of the Constitution expressly conferred upon the courts and reserved unto them the power to is-

sue the writs mentioned in the Constitution, one of which writs is that of injunction. If they had intended that the courts should have such power as may be prescribed by law, and to issue writs of injunction as may be defined by the legislature, they would have said so. See: **State ex rel. Robinson v. Durand**, 36 Utah 93, 104 Pac. 760, where the Court said:

> " . . . If it is within the power of the legislature to enlarge the office of the writ, it must also be within its power to abridge it. If such power to enlarge and abridge exists, then the power of courts to issue the writs, and the cases to which they may apply, are wholly dependent upon the will and discretion of the legislature. In such cases the power of courts to issue the writs is as by statute provided, and not as provided by the Constitution. . . . "

And the Court held that the legislature could not break in upon the Constitution or encroach upon the prerogative of courts, and that its enactment extending and enlarging the office of the writ of prohibition was void. The power conferred upon the courts by the Constitution cannot be enlarged or abridged by the legislature.

See **Blanchard vs. Golden Age Brewing Company** (Washington, 1936) 63 P. (2d) 397 holding under constitutional provisions practically identical with ours and Labor Disputes Act also practically identical with ours that the latter was unconstitutional in so far as it purported to limit or restrict the powers of the court of equity to issue injunctions in labor disputes:

> "Thus, by constitution and independently of any legislative enactment, the judicial power over cases in equity has been vested in the courts, and, in the absence of any constitutional provisions to the contrary, such power may not be abrogated or restricted by the legislative department" page 405.

The rationale back of this line of authorities is brought in sharp relief when one considers the federal judicial structure. In the federal field the Norris-LaGuardia Act (1932) provided that:

> "No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary injunction in a case involving or growing out of a labor dispute except in strict conformity with the provisions of such sections." 29 U.S.C.A. Sec. 101.

But Section 113 (d) of that Act defines court of the United States as:

> "The term 'court of the United States' means any court of the United States **whose jurisdiction has been or may be conferred or defined or limited by Act of Congress."**

It is clear, as Mr. Justice Stone stated in **Lockerty vs. Phillips** 319 U. S. 238, 63 S. Ct. 1019, "The congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to

Congress may seem proper for the public good."

The only Court created by our United States Constitution is the Supreme Court itself. All other courts including U. S. District and Circuit Courts of Appeal are established by Congressional Act.

The District Courts of the State of Utah, unlike inferior United States courts, obtained their power to issue Injunctions from the constitution. The legislature may not restrict that power.

Defendants further contend the injunction issued in this case was too sweeping in its terms. The trial court in the instant case found that no picket line could be maintained in view of what had happened without its having the advantage of a coercive influence, and that the permanent injunction granted was restricted to the situation as it exists, with the plaintiffs operating their mine under the arrangement that it is now being operated under (398). Such finding by the trial court, and its granting of a permanent injunction, is the same realistic appraisal as that of the court in the case of **Morris vs. Local Union No. 494 of Amalgamated Meat Cutters and Butchers Workmen of Spokane et al,** 234 P. 2d 543 (Wash. 1951). To accept the defendants claim that the reason for picketing the plaintiffs' coal mine was that the picket line contributed to the free enterchange of thought and communication of ideas and factual information, and that it was not to coerce the plaintiffs into signing a 'take it or leave it' contract offered by the union (116), and to deprive them of the liberty of lawfully conducting their business in the only manner that, in

their judgment (129), it could be profitably conducted, would be to put reality aside. Peaceful picketing, which the facts in the instant case belie, for an unlawful purpose, that is, in contravention of the "right to work" policy of the State, as in this case, can be legally enjoined. **Hanson v. International Union of OperatingEngineers Local No. 406**, supra, (1955); **Woodard et al vs. Collier et al**, 78 S. E. 2d 526 (1953).

Point III

THE PICKETING HEREIN WAS NOT PEACEFUL, AND WAS FOR AN UNLAWFUL PURPOSE.

The contention of defendants is that the trial court disregarded all of the evidence of the defendants and gave credence to the plaintiffs' testimony in toto. Afforded the opportunity to observe the demeanor of the witnesses, and occupying the advantageous position of determining their credibility and the weight to be given to their testimony, the trial court found threats in what the pickets said when they stopped certain of the plaintiffs and an independent trucker. The evidence amply and clearly preponderates in support of that finding.

Plaintiffs submit that men, in the normal course of their lives, react to current situations in the light of their past experience and accumulated knowledge. In a realistic approach to the subject of picketing, the individual reactions of those picketed, or those indirectly affected by the picketing, cannot be divorced from their past experience. As stated in the dissenting opinion in **State vs.**

Washington ex rel Lumber and Sawmill Workers v. Superior Court, 164, P. 2d 662 (1945), cited by the defendants, picketing, whether peaceful or otherwise, is nothing less than economic pressure, economic coercion, or economic warfare, whichever of those terms may be the most suitable to the particular occasion, and members of the public endeavor to keep as far away from it as possible in order to avoid embarrassing situations. The reactions of the witnesses in this case to the statements made by the pickets, were entirely normal under the circumstances and fully justified, and the trial court so found (300).

From all of the evidence introduced, the court could well find, as it did (397), that the picketing of plaintiffs' mine was enmeshed in violence — the blowing up of a bridge and the scattering of nails, and the shooting of cars. Defendants complain of the admission by the trial court (391) of the evidence offered by plaintiffs of the shooting of trucks by the defendant Faye Olsen (308). The record discloses (309) that the trial court was fully advised that it was a matter within its sound discretion to determine whether the incident was so closely related, by virtue of the time or the act done, as to be admissable, and was cited 31 C. J. S. 872-73, Sec. 162:

> "Evidence of facts which happened before or after the transaction in issue, but which relate directly to it, may be admissable, as where they were, or probably may have been, the cause or effect of a fact in issue."

But aside from the above considerations as to whether or not the picketing in the instant case was peaceful or otherwise, it was not for a lawful purpose and could therefore be enjoined.

The picketing of plaintiffs' mine was illegal conduct contrary to the declared public policy of the State of Utah as expressed in the Utah Right to Work Law, Laws of Utah 1955, Ch. 54, Sec. 1, (34-16-2 U.C.A. 1953):

> "Public policy.—It is hereby declared to be the public policy of the state of Utah that the right of persons to work, whether in private employment or for the state of Utah, its counties, cities, school districts, or other political subdivisions, shall not be denied or abridged on account of membership or nonmembership in any labor union, labor organization or any other type of association; further, that the right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion."

In **Building Service Employees International Union, Local 262, vs. Gazzam**, 339 U. S. 532, the court said:

> "The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. Primarily it is for the law makers to determine the public policy of the State."

and it was held that a state is permitted to enjoin peaceful picketing which is in violation of the state's public pol-

icy. And to the same effect see **Marcus Heath et al vs. Motion Picture Machine Operators Union No. 170**, 290 S. W. 2d 152 (1956); and **Hanson v. International Union of Operating Engineers Local No. 406**, supra, (1955).

See also **Local Union No. 10 et al v. Graham et al**, 345 U. S. 192, 73 S. Ct. 585 (March 16, 1953) wherein the Court stated "The basic question here is whether the Commonwealth of Virginia, consistently with the Constitution of the United States, may enjoin peaceful picketing when it is carried on for purposes in confilct with the Virginia Right to Work Statute." The Court answered this question in the affirmative.

POINT IV

NOT ALL PEACEFUL PICKETING IS THE LEGITIMATE EXERCISE OF FREE SPEECH, AND PEACEFUL PICKETING TO INDUCE PLAINTIFFS, WHO OPERATE WITHOUT OUTSIDE HELP, TO JOIN UNION WAS ILLEGAL, CONTRARY TO PUBLIC POLICY OF THE STATE OF UTAH, AND COULD BE ENJOINED.

One of the cases cited by defendants, in the light of the development of the law as related to the assimilation of picketing to the right of free speech, is almost prophetic. Se: **International Union of Operating Engineers, Local No. 3 v. Utah Labor Relations Board**, 115 Utah 183, 203 P. 2d 404, wherein this Court said:

> "It may be noted here that none of the constitutional guarantees embodied in the first eight amendments to the Constitution of the United

States are absolute rights. All of them are subject to some regulation by the state. To consider them as absolutes would be, in effect, to deny to the states any police power.

And,

"Like the other fundamental rights guaranteed in the Bill of Rights, the right of free speech is, and always has been, subject to reasonable regulation by the state when it collides with more paramount public interest."

And,

"It must be recognized that picketing, as an exercise of the right of free speech, is subject to police regulation by the state. We are aware of no decision, either of the Supreme Court of the United States, or of any state court, which has either held or inferred to the contrary. In fact in nearly every opinion treating the subject which has come to our attention, the court has specifically pointed out the right of the state to regulate picketing."

And,

"The cases in the Supreme Court of the United States in regard to the relation of picketing to free speech under varying situations, if not in unstable equilibrium, are not completely stabilized, and necessarily so because in this field of the law, labor's right on the one hand to communicate information or persuade through picket line technique, and on the other hand the rights of the

employer or of the public are in delicate balance, if not in opposition. The law may be pronounced only according to various factual situations as they are presented on review."

This Court clearly took a very cautious position that would enable it to conform to the growth of the law upon this novel concept of the right of free speech as related to picketing. The growth of the law during the past six years has eminently justified this Court's considered restraint. What has been most descriptively designated as "The Shriveling of the Doctrine" of free speech has devoleped. See: **Labor Relations and the Law,** (Little Brown & Co., Boston, 1953) page 756. Picketing is no longer considered as purely free speech, but as a distinct entity, and although one of its elements is recognized as communication, this element is but one of many to be considered. See: **Utah Law Review,** Vol. 5, No. 1, page 98, (1956) "Peaceful Picketing and Free Speech in State Courts: 1949-56."

In **Hanke et al v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 309, et al,** 207 P.2d 206, (Wash. 1949), the Court found that there was little, if any, dispute in the evidence. The respondents and his three sons were operating a co-partnership business in the city of Seattle, under the firm name of Atlas Auto Rebuild. They had no employees in the operation of any part of their business, but themselves alone did all the work and labor connected therewith. A system of peaceful picketing of the respondents' place of business was instituted by the Union in order to compel the

respondents to confine themselves to shorter hours of business and limited periods as demanded by the Union. The conrtolling question, as stated by the Supreme Court of Washington was: whether or not, under the facts of the case, the granting of injunctive relief by the trial court against the appellant union and its representatives violated the provision of the Federal constitution forbidding the abridgement of freedom of speech. The Supreme Court of Washington found that the purpose of the picketing was to indirectly compel the respondents to become members of the Union, and directly to coerce the respondents to enter into an agreement under which they would carry on their business only during those hours and days arbitrarily fixed by the Union. The Court found and declared that the picketing activity conducted by the Union constituted coercion and was therefore unlawful.

The decision of the Supreme Court of Washington was affirmed by the United States Supreme Court in **International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309, et al., v. A. E. Hanke et al**, May 8, 1950, 339 U.S. 470, 70 S.Ct. 773, 13 ALR2d 631. Many of the authorities relied upon by defendants in their brief in the instant case were distinguished, and the Supreme Court, speaking through Mr. Justice Frankfurter, said:

> "* * * we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our de-

cisions reflect recognition that picketing is indeed a hybrid!'. Freund, On Understanding the Supreme Court 18 (1949). See also Jaffe, In Defense of the Supreme Court's Picketing Doctrine, 41 Mich L Rev 1037 (1943). The effort in the cases has been to strike a balance between the constitutional protection of the element of communicaion in picketing and the 'power of the State to set the limits of permissable contest open to industrial combatants.' Thornhill v. Alabama, 310 US 88, 104, 84 L. ed 1093, 1103, 60 S.Ct. 736. A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect.

"These two cases emphasize the nature of a problem that is presented by our duty of sitting in judgment on a State's judgment in striking the balance that has to be struck when a State decides not to keep hands off these industrial contests. Here we have a glaring instance of the interplay of competing social-economic interests and viewpoints. Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profound-

est thinkers from Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power. 'There is a widespread belief . . . , that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; . . . ; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.'

"* * * when one considers that issues not unlike those that are here have been similarly viewed by other States and by the Congress of the United States, we cannot conclude that Washington, in holding the picketing in these cases to be for an unlawful object, has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice. Mindful as we are that a phase of picketing is communication, we cannot find that Washington has offended the Constitution.

In **Morris v. Local Union No. 494 of Amalgamated Meet Cutters and Butcher Workmen of Spokane et al,** supra (Wash. 1951), it was held that picketing which was coercive and intended to force either a self-employer or

his wife to join a union, and to force the employer to compel any employees to join the union, regardless of their personal desires, would be enjoined as contrary to the public policy of the state. The court said:

> "To claim as the reason for picketing Morris's business establishment that the picket line contributed to the free interchange of thought and communication of ideas and factual information in the city of Spokane, and that it was not to coerce Morris into signing the 'take it or leave it' contract offered by the union, is to put reality aside. That contract, as the trial court found, would compel Morris or his wife to join the union, and would require Morris to compel his employees, if any, to join the union."

In **Tarr v. Amalgamated Ass'n. of Street Electric Ry. & Motor Coach Employees of America, Division 1055 et al**, supra, the plaintiff purchased certain equipment and leased other facilities from a transit company and commenced operations on his own responsibility on a permit from the city. The plaintiff had been the business manager of the transit company, and had participated in the negotiations over the dispute between the company and the defendant union. The plaintiff had entered into a conditional sales contract with the transit company wherein he purchased the motor vehicles of the company; paid nothing down but agreed to pay $600.00 per month. The defendant union picketed the plaintiff, who secured an injunction. The defendants appealed, and the Supreme Court of Idaho in affirming the injunction said:

"There being no labor dispute and the picketing being unlawful, the acts of the defendants were not protected by the First and Fourteenth Amendments to the Constitution of the United States, and the court was not restricted by the constitution or otherwise in the issuing of an injunction and has jurisdiction so to do."

See **Woodard et al v. Collier et al**, 78 S.E. 2d 526 (1953). In **Hanson v. International Union of Operating Engineers Local No. 406**, supra, (1953), it was held that peaceful picketing for an unlawful purpose, that is, in contravention of the "right to work" policy of the State, could be legally enjoined.

In **Building Service Employees International Union, Local 262, v. Gazzam**, 339 U.S. 532, the court said:

"This Court has said that picketing is an exercise of the right of free speech guaranteed by the Federal Constitution. * * * But since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. * * *."

In **Marcus Heath et al v. Motion Picture Machine Operators Union No. 170**, supra, (1956), it was held that to induce the co-owner of a theatre to cease operating a projection machine and to hire a union member in his place was against state public policy and was properly

enjoined, since the co-owner, who was ineligible for union membership, was entitled to the same immunity as would have to be accorded a one-man business in which the businessman-proprietor performed all his work without the assistance of employees.

The defendants construe the words "peaceful persuasion" as synonomous with "peaceful picketing". The authorities above cited cannot be harmonized with such contention, for it is recognized that even peaceful picketing, while it has ingredients of communication, is a form of economic coercion having far more potential than mere speech.

CONCLUSION

Without repeating the specific points above enumerated and argued, we submit that both the law and the facts in this case amply support the decision of the able and discerning trial judge.

Respectfully submitted,

S. J. SWEETRING

Attorney for Respondents
Silvagni Building
Price, Utah